

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

<b>Nextel Partners Operating Corp. and</b>	)	
<b>NPCR, Inc. d/b/a Nextel Partners</b>	)	
	)	<b>ICC Docket No. 03-0487</b>
<b>Application for Certificates of Service</b>	)	
<b>Authority to Operate as Providers</b>	)	
<b>of CMRS Telecommunications Services</b>	)	
<b>in the State of Illinois</b>	)	

**NEXTEL PARTNERS OPERATING CORP. AND NPCR, INC. d/b/a NEXTEL  
PARTNERS' RESPONSE TO PETITION TO INTERVENE AND MOTION TO DISMISS  
OF CERTAIN INTERVENORS**

Nextel Partners Operating Corp. ("NPOC") and NPCR, Inc. d/b/a Nextel Partners ("NPCR"), by and through their attorneys, hereby submit this Response to the Petition to Intervene and Motion to Dismiss (the "Petition and Motion") filed by the following persons: Viola Home Telephone Company, Woodhull Community Telephone Company, New Windsor Telephone Company, Oneida Telephone Exchange, Montrose Mutual Telephone Company, Glasford Telephone Company, and The Crossville Telephone Company (collectively, the "Intervenors"). The Intervenors seek to have the Application of NPOC and NPCR (the "Application") to the Illinois Commerce Commission (the "Commission") for Certificates of Service Authority (the "Certificates") to provide Commercial Mobile Radio Service ("CMRS") telecommunications services in the State of Illinois dismissed on grounds that (1) NPOC and NPCR do not themselves hold Federal Communications Commission ("FCC") licenses, and (2) issuing the Certificates would involve the Commission in an alleged piercing of corporate veils that exceeds its authority. The Petition and Motion lack merit, ignore Federal law under which

CMRS providers may operate under FCC licenses held by wholly-owned subsidiaries, and ignore state law regarding respect for the corporate form. NPOC and NPCR therefore oppose the Petition and Motion and state as follows:

### **BACKGROUND**

1. NPOC and NPCR initiated this proceeding by filing their verified Application to the Commission for the Certificates to provide CMRS telecommunications services in the State of Illinois pursuant to Section 13-401 of the Public Utilities Act (the “Act”), 220 ILCS 5/13-401.

2. NPOC, through its operating subsidiary, NPCR, will provide mobile telecommunications service within the State of Illinois pursuant to the FCC 800 MHz economic area (“EA”) and site-specific licenses that are listed on Attachment C to the Application (the “FCC Licenses”). These licenses are licensed to NPOC’s wholly-owned license holding subsidiaries, Nextel WIP License Corp. and Nextel WIP Expansion Corp., through which NPOC holds the licenses.

3. NPOC, through its operating subsidiary, NPCR, provides advanced digital wireless telecommunications services in mid-sized and tertiary markets across the United States under the brand name “Nextel.” Through its subsidiary license holding entities, NPOC holds licenses for wireless frequencies in markets where over 53 million people live and work. In 57 of the top 200 metropolitan statistical areas in the United States, NPOC, through its operating subsidiary, NPCR, has constructed and operates a digital mobile network compatible with the digital mobile network constructed and operated by Nextel Communications, Inc., which is a

separate publicly-traded company listed on NASDAQ. Nextel Communications, Inc. owns approximately 32% of the common stock of Nextel Partners, which owns 100% of NPOC.<sup>1</sup>

4. On May 8, 2003, NPCR filed with the Commission its Petition for Designation as an Eligible Telecommunications Carrier (“ETC”) in the State of Illinois in Docket No. 03-0312. The proceedings in Docket 03-0312 have been continued pending the issuance of the Certificates to NPOC and NPCR in this Docket. Section 13-401 of the Act mandates that the Commission approve an application for a Certificate of Service Authority by a CRMS provider “without a hearing” on a showing by the applicant that it holds CRMS licenses from the FCC. The only issue in this Docket is whether the applicants have licenses. The Application shows that the applicants hold the FCC Licenses through wholly-owned license holding subsidiaries. Because the Act proscribes a hearing in this Docket, the Commission must conclude that there is simply no scope for any participation by the Intervenor, nor, indeed, any issue to be addressed by any would-be intervenor. The Intervenor’s proposed intervention will not only delay this Docket, but will also convert it into something beyond a notice filing. The main objective of the Intervenor’s Petition and Motion in this Docket is to delay or prevent the designation of Nextel Partners as an ETC in Docket No. 03-0312 for the Intervenor’s own self-serving purposes. The Intervenor admits in the Petition and Motion that they have no interest in this Docket, and that they will be affected by the outcome of this Docket only as it relates to Docket No. 03-0312. (Petition and Motion, par. 4). Because of this, the Commission should deny both the Petition to Intervene and the Motion to Dismiss.

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<sup>1</sup> NPCR acts as NPOC’s operating subsidiary throughout NPOC’s service territory except in the States of Vermont and New York, where NPOC operates through its wholly-owned direct subsidiary, Nextel Partners of Upstate New York, Inc.

## **DISCUSSION**

### **A. FCC Policy Focuses not on who the Licensee is, but Rather on who Controls the License.**

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5. Paragraphs 5, 6 and 7 of the Petition and Motion contain the gist of the Intervenor's argument, which is that because neither NPOC nor NPCR hold FCC licenses in their own names, they have no authority from the FCC to provide commercial mobile radio service in the areas covered by the FCC Licenses, including the State of Illinois.

6. From the standpoint of the FCC, the core issue is not who the licensee is, but rather who controls the license. If a corporate group that is under common control both operates the system in which the license is utilized and controls the license, then the FCC does not draw an artificial distinction between the named license holder and the system operator. Here, NPOC controls each license through two license holding companies that are wholly-owned subsidiaries of NPOC: Nextel WIP License Corp. and Nextel WIP Expansion Corp. The license holding entities are the named licensees, and NPOC is the owner of the license holding companies. NPOC operates its system through an operating company called NPCR, Inc. that also is its wholly-owned direct subsidiary. NPCR is the operating company that utilizes the licenses, which are owned by license holding subsidiaries, and all of these corporations are wholly owned by NPOC. NPOC, through its 100% ownership of NPCR, retains control over the licenses and over all operations utilizing the licenses.

7. As stated in the Application, the Commission has previously issued Certificates of Service Authority to wireless telecommunications carriers in cases in which the named holder of the FCC license was a wholly-owned subsidiary of the applicant for the Certificate of Service Authority. In Ill. C.C. Docket No. 00-0414, VoiceStream PCS II Corporation ("VoiceStream

II”) applied to the Commission for a Certificate of Service Authority. VoiceStream II’s application to the Commission stated expressly that subsidiaries of VoiceStream II were the FCC license holders, and that VoiceStream II was the operating entity. (Ill. C.C. Docket No. 00-0414, Application of VoiceStream PCS II Corporation, pars. 1 and 3, June 12, 2000). The Commission granted the Certificate of Service Authority to VoiceStream II without a hearing, within twenty-five (25) days of the filing of the Application, and by a unanimous vote. (Ill. C.C. Docket No. 00-0414, Voting Record, July 6, 2000). In this Docket NPOC and NPCR simply request the same treatment afforded by the Commission to other providers of CMRS telecommunications services.

8. The FCC regularly deals with, and recognizes, the use of wholly-owned license-holding subsidiaries. E.g., In Re Applications of SBC Communications Inc. and Bellsouth Corporation, 15 F.C.C.R. 11003 (2000) (dealing with the conversion of SBC’s subsidiary corporations holding or controlling more than 2,300 FCC licenses into limited liability companies). The Intervenor’s argument in the Petition and Motion would question whether an entity such as SBC Communications Inc. is authorized to provide cellular service in the State of Illinois where the FCC issued the licenses not to SBC, but to an SBC subsidiary. Such an interpretation would undermine the Federal licensing scheme and unnecessarily restrict corporate options and operations.

9. The FCC’s policy with regard to license holding subsidiaries is even more apparent in its treatment of the transfer of commercial wireless licenses such as those held by NPOC’s through its license-holding subsidiaries. These licenses can be transferred from parent to wholly-owned subsidiary and between wholly-owned subsidiaries on a pro forma basis. A pro forma transfer means that the FCC approves the transfer immediately, without prior public

notice, without opportunity for comment, and without undertaking a public interest determination. See Questions & Answers Regarding Private Wireless Licensees' Obligations Under Section 310(d) of the Communications Act of 1934, 100 FCC Lexis 4926, 6.a. and 8. The rationale underlying the FCC's position is that so long as control of the license is unchanged, the particular entity holding the license is not significant. From the FCC's viewpoint, by virtue of control of the licenses, NPOC and NPCR are clearly the "cellular applicants" contemplated by Section 13-401(a) of the Act.

10. The use of separate subsidiaries to hold FCC cellular communications licenses is commonplace in that industry. See, e.g., In the Matter of SES Americom, Inc., File Nos. SAT-MOD-20021108-00204, et al., 2003 WL 21955034 (August 15, 2003) (F.C.C.) (U.S. corporations holding various Commission-issued licenses and authorizations, became indirect wholly-owned subsidiaries of SES Global, a foreign corporation); Public Notice re Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless Seek FCC Consent for Assignment of Fifty Broadband Personal Communication Services Licenses, WT Docket No. 03-19, 2003 WL 138886 (F.C.C.), 18 F.C.C.R. 719 (January 21, 2003) (notice regarding application by cellular communications company and its license holding subsidiaries for approval of transfer of licenses). Indeed, the use of license holding subsidiaries by major telecommunications carriers is so common that one wonders whether the Intervenor's are the only carriers unaware of the practice. At any rate, what is evident is the Intervenor's' elevation of form over substance to advance their self-serving and meritless arguments.

11. The Intervenor's' Petition and Motion invites the Commission to flagrantly disregard FCC policy on the manner in which FCC licenses may be held. The Commission should decline that invitation, and deny the Petition and Motion.

**B. The Application Presents No Issue Regarding Piercing of Corporate Veils**

12. The Intervenors claim that the Application results in the piercing of corporate veils, although the Intervenors can't make up their minds whether it is the Commission that is doing the alleged piercing (Petition and Motion, par. 12), or whether NPOC and its subsidiaries are piercing themselves in some alleged exercise in corporate veil mutilation (Petition and Motion, par. 11). Ultimately, the Intervenors' who-pierced-whom mystery is irrelevant because the Intervenors' argument is arrant nonsense.

13. The law governing the piercing of the corporate veils was stated best nearly a century ago: "If any general rule can be laid down ... it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will disregard the corporation...." United States v Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905). Substantial showings of such wrongful acts are still required under Illinois law to pierce the corporate veil. Jacobson v. Buffalo Rock Shooters Supply Inc., 664 N.E.2d 328 (Ill. App. 1996). In short, absent a serious abuse of the corporate form, there can be no question of piercing the corporate veil. The Intervenors' argument that the Application results in a piercing of the corporate veil amounts to an assertion that the operating and license holding structure of NPOC, NPCR and their license holding subsidiaries is a serious abuse of the corporate form.

14. The description of FCC policy on license-holding subsidiaries, described above, makes it clear that there is nothing about the manner in which NPOC operates its system and holds the FCC licenses that is either improper or unlawful under Federal law. Indeed, the operating company/license holding subsidiary structure is commonplace in the wireless

telecommunications industry. The relationships between NPOC, NPCR and the license holding subsidiaries do not abuse the corporate form in any way.

15. Nothing in the Application involves the piercing of any veil, corporate or otherwise. The only veils involved in this Docket are the ones that the Intervenors have drawn over their own eyes, thereby blocking their vision of applicable Federal and Illinois law.

### **CONCLUSION**

WHEREFORE, for the above-stated reasons, Nextel Partners Operating Corp. and NPCR, INC. d/b/a Nextel Partners respectfully request that the Petition and Motion filed by the Intervenors be denied.



Respectfully submitted,

NPCR, INC. d/b/a NEXTEL PARTNERS

NEXTEL PARTNERS OPERATING CORP.

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